No. 21967

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C. DOUGLAS WIKLE, Trustee in Bankruptcy, for NEVADA HENDERSON LAND CO., a corporation,

Appellant,

vs.

COUNTRY LIFE INSURANCE COMPANY, et al.,

Appellees.

On Appeal From the United States District Court
For The Central District of California

BRIEF OF APPELLEE SEQUOIA HOSPITAL DISTRICT

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

Texts

dismissed on jurisdictional grounds a quiet title action brought by Appellant-trustee in bankruptcy. This court has appellate jurisdiction under §24a of the Bankruptcy Act, 11 U.S.C. §47a.

STATEMENT OF THE CASE

This appellee has read and examined the APPELLANT'S OPENING BRIEF and the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY. This appellee believes that the brief for appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY constitutes a full and sufficient response to the APPELLANT'S OPENING BRIEF. A repetition of the points and authorities therein contained would merely swell the record and accomplish no useful purpose. This appellee, therefore, adopts in its entirety the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY as a response on its own behalf. Certain additional comments, however, should be made on the part of appellee SEQUOIA HOSPITAL DISTRICT.

STATEMENT OF FACTS AND QUESTIONS PRESENTED

Appellee SEQUOIA HOSPITAL DISTRICT respectfully refers this Honorable Court to pages 3 through 7 of the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY wherein the facts of this matter are stated in detail.

SUMMARY OF ARGUMENT

Summary jurisdiction of a bankruptcy court in a Chapter XI proceeding to adjudicate controversies with respect to property may be based upon either actual or constructive possession of such property by the debtor or the bankruptcy court or upon consent of the adverse party, but not upon the sole fact that the debtor held legal title to such property at the time his petition was filed. In the instant case neither the debtor nor the bankruptcy court had possession of the property in question when the debtor's petition was filed. Rather, such possession was in the state court receiver, appointed by the Superior Court of San Mateo County. Furthermore, no adverse party consented to the jurisdiction of the bankruptcy court, timely objections to summary jurisdiction having been filed [see, e.g., R. 34, 185, 264, 294, 359.]

Even if the bankruptcy court did have summary jurisdiction of this matter, it correctly exercised its discretion in refusing to exercise such jurisdiction. Appellee Sequoia Hospital District would have been prejudiced had the bankruptcy court attempted to decide this matter, since a full adjudication of its rights is possible only in a plenary action.

ARGUMENT

8 Collier on Bankruptcy, Par. 3.02, pp. 176-182 (quoted by appellant in its opening brief at pp. 23-24) states that a Chapter XI court has summary jurisdiction over controversies arising out of property either owned by the debtor at the time his petition was filed or in his actual or constructive possession at that time. Perhaps this was the law under former Section 74 of the Bankruptcy Act (see 9 Remington on Bankruptcy, §3573, pp. 214-15 [6th ed. 1955]), but today, as stated in 9 Remington on Bankruptcy §3574, pp. 217-18 (6th ed. 1955):

> "It is well settled that jurisdiction of a bankruptcy court in ordinary bankruptcy proceedings does not extend to property which, although asserted by some of those in interest to belong to the bankrupt and his estate, is, at the time of institution of the proceedings, in

possession of one claiming it adversely. This principle seems now to apply with full force to arrangement proceedings under Chapter XI, although there were exceptions to its application under former Section 74. Thus it has been held that Chapter XI does not confer on the bankruptcy court any greater jurisdiction to supersede prior receiverships than is conferred in ordinary bankruptcy." (Emphasis added.)

Thus, in Sada Yoshinuma v. Oberdorfer Insurance Agency, 136 F.2d 460, 461 (5th Cir. 1943), a proceeding under Chapter XI, the court stated:

"[T]he power of the bankruptcy court in proceedings under Chapter XI is not greater than that of the court in ordinary bankruptcy proceedings. The filing by the bankrupt of his arrangement petition had no more effect to oust the jurisdiction of the State Court than the filing by his creditors of an involuntary petition in bankruptcy had."

Similarly, In re California Paving Co., 95 F.Supp. 909 (N.D. Cal. 1951), again involved a petition for a Chapter XI arrangement. The court there held an exercise of summary jurisdiction to be improper, stating:

"As stated by the Supreme Court in Thompson v. Magnolia Petroleum Co., supra, 'Bankruptcy

> Courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. [309 U.S. 478, 60 S. Ct. 630.] This rule has been applied in arrangement proceedings. See Lockhart v. Garden City Bank & Trust Co., 2 Cir., 116 F.2d 658."

See also Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1954), and In re Sullivan, 113 F.Supp. 70 (N.D. Cal. 1953), where the law of straight bankruptcy with respect to summary jurisdiction was held applicable to Chapter XI proceedings as far as possession is concerned.

The cases cited in Collier in support of the proposition that a Chapter XI court may exercise summary jurisdiction over controversies arising out of property owned or possessed by a debtor are less than decisive. A brief review of those decisions will demonstrate their inadequacies.

In re Journal-News Corp., 193 F.2d 492 (2nd Cir. 1951), was a per curiam decision dealing with the extent of summary jurisdiction of a Chapter XI court. It was there held that since a debtor corporation has no property interest in shares of its own stock, sales of such shares by third party shareholders could not be enjoined by the bankruptcy court. This case simply does not

treat our problem.

In re Commonwealth Bond Corp., 77 F. 2d 308 (2nd Cir. 1935), also cited by the Collier editors, dealt with the extent of summary jurisdiction of a bankruptcy court in a reorganization proceeding under old Section 77B of the Bankruptcy Act of 1933. There, the debtor held certain property as a fiduciary. An action was brought in a state court to have the debtor removed as "trustee," and thereafter the debtor filed his petition under Section 77B and sought to stay the state court action. In denying the stay, the Court of Appeals merely held that summary jurisdiction could not be based solely on the debtor's possession of property in a fiduciary capacity.

Finally in support of their position, the Collier editors cite Texas Co. v. Hauptman, 91 F. 2d 449 (9th Cir. 1937), again a case decided under old Section 77B. There the debtor owned an interest in a preferred mortgage on a ship. Subsequent to the debtor's petition under 77B, appellant caused the Admiralty court to seize the vessel. The bankruptcy court restrained the libel proceedings. On appeal to this court, however, the temporary restraining order was dissolved, except insofar as the debtor's interest was affected. This court quoted The Rock Island Bridge, 6 Wall. (73 U.S.) 213, 215, 18 L. Ed. 753 to the effect that:

> "A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of

the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages."

It is difficult to see how, from such a specialized set of facts, it can be rationalized that in all cases ownership alone confers summary jurisdiction over the property on the Bankruptcy Court.

The conclusion suggested by the foregoing discussion, despite indications to the contrary in 8 Collier on Bankruptcy, supra, is that either actual or constructive possession of property by the debtor or the bankruptcy court is necessary to confer summary jurisdiction on a bankruptcy court in either a straight bankruptcy or a Chapter XI proceeding. No court has indicated disapproval of decisions such as Emil v. Hanley, 318 U.S. 515, 63 S.Ct. 687, 87 L.Ed. 954 (1943); Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940); Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L. Ed. 1060 (1931); Carney v. Sanders, 381 F.2d 300 (5th Cir. 1967); Smith v. Hill, 317 F.2d 539 (9th Cir. 1963) and Bryan v. Speakman, 53 F.2d 463 (5th Cir. 1931). In fact, no rational explanation of the above cases could be made if ownership of property alone were a basis for summary jurisdiction.

If, under any circumstances, it could be argued that title alone confers summary jurisdiction upon the bankruptcy court in Chapter XI proceedings, then such title would have to be both legal and equitable title and the debtor should also have the right to immediate possession if it does not have such possession in fact. Only by incorporating these additional elements would such a proposition in any way be consistent with the overwhelming body of law on this subject. However, in the present case the debtor did not have the right to possession because of the pending State court proceeding which was commenced in aid of enforcement of a non-judicial lien. Furthermore, even assuming arguendo that appellant's theory is correct, it should be noted that apparently the factual and legal situation of the case now before this Honorable Court prevent the application of his theory. As pointed out in the Referee's Certificate on Review [R. 3] no actual petition under Chapter XI can be found in the record. At the time the orders being appealed from were handed down there was a Voluntary Petition in Bankruptcy pending [R. 40], while no proceedings under Chapter XI were pending.

Under Bankruptcy Act §18f, 11 U.S.C. §41f, the filing of a voluntary petition in bankruptcy results in an adjudication as a matter of law, converting the Chapter XI proceeding into one of straight bankruptcy. Therefore, the law of straight bankruptcy should apply in this case, and since neither appellant

nor the bankruptcy court had actual or constructive possession of the property in question, the bankruptcy court does not have summary jurisdiction over the controversy.

APPELLEE SEQUOIA HOSPITAL DISTRICT WILL BE PREJUDICED UNLESS THE ORDER OF MARCH 8, 1967, IS AFFIRMED.

Appellee COUNTRY LIFE INSURANCE COMPANY purchased the real property in question on or about January 14, 1966, upon the exercise of the power of sale in a trust deed on the property. Said sale was conducted by First American Title Insurance and Trust Company, a respondent in the District Court, but since dismissed from this action [R. 487]. On or about March 31, 1966, appellee COUNTRY LIFE INSURANCE COMPANY leased the real property in question to appellee SEQUOIA HOSPITAL DISTRICT and in conjunction therewith gave lessee SEQUOIA an option to purchase the property [R. 284, 295-96]. Appellee SEQUOIA HOSPITAL DISTRICT has never submitted to the summary jurisdiction of the bankruptcy court to try the issue of its leasehold title, possessory interest, and option right. Furthermore, there has been no compliance with Section 21(g) of the Bankruptcy Act, 11 U.S.C. §44(g), and even if this appellee had searched the record of the within proceeding on the date that it had acquired its leasehold title, it would have discovered only the order of March 3, 1966 of

Referee Kinnison [R. 150], permitting the conveyance under which this appellee claims. The fact that the deed may recite that the property was sold pursuant to orders in bankruptcy, therefore, would not alert anyone to any possible infirmities by reason thereof.

The bankruptcy court has never had jurisdiction over the subject property, and if such jurisdiction did exist at the time of the order entered by Referee Kinnison, that order confirmed the validity of such title as this appellee derived by reason of the sale under the deed of trust and the subsequent lease and option right.

Should the foreclosure sale be held invalid, the rights of the several appellees herein can only be determined by a plenary suit. As is so adequately stated in the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY, at pages 22 and 23:

> "[I]f respondent First American Title Insurance and Trust Company, the trustee under the deed of trust, conducted an improper sale under the power of sale and thus prejudiced the beneficiary, respondent Country Life Insurance Company, the latter might well have a claim for damages against the former. The bankruptcy court, of course, could not award such relief. Similarly, if the title acquired by Country Life Insurance Company

as a result of the sale was defective, it might be liable to respondent Sequoia Hospital District to which it granted an option to purchase. Again, the bankruptcy court could not adjust the rights between these parties. Moreover, since the only possible cause of action the trustee in bankruptcy has against respondent First American Title Insurance and Trust Company and respondent Title Insurance and Trust Company is in personam, a judgment on such claim could be obtained only in a plenary suit absent consent of the adverse parties. Cf. Suhl v. Bumb, 348 F.2d 869 (9th Cir., 1965)."

Accordingly, the Referee properly determined that the Superior Court of San Mateo County is the proper place for a trial involving rights in real property located in that county.

CONCLUSION

For the reasons set forth in the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY and for the reasons set

forth herein, the order of the Honorable Pierson M. Hall, United States District Judge, dated March 8, 1967, should be affirmed.

Respectfully submitted,

GENDEL, RASKOFF,
SHAPIRO & QUITTNER

By BERNARD SHAPIRO

Attorneys for Appellee
Sequoia Hospital District

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Bernard Shapiro
BERNARD SHAPIRO